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In the Supreme Court of the United States

October Term, 1973

No. 73-728

CITY OF MIAMI, a municipal corporation,

Petitioner,

vs.

DAVID SPICY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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MIAMI REVIEW — 371-4853 — 377-3721

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JURISDICTION

I.

NO FEDERAL GROUNDS WERE TIMELY RAISED AND, THEREFORE, THE DECISION DID NOT PASS ON ANY.

The Respondent respectfully submits that the City has failed to invoke the jurisdiction of this Court pursuant to Title 28, U.S. Code, §1257 (3). The City claims that the Supreme Court of Florida, by its Opinion, denied due process and equal protection of the law to it by holding the City liable for the torts of another, to wit, Jackson Memorial Hospital. The City has, pursuant to Rule 23(1)(f) of this Court, specified the stage of the proceedings in the court of first instance and in the appellate court, and the manner in which the federal questions sought to be reviewed were raised. The Respondent notes that the City states in its Petition as follows:

> "The contention was raised in this Petition for Rehearing that the Supreme Court of Florida violated the right of the City of Miami to due process of law under the 14th Amendment to the United States Constitution by making the City of Miami responsible for the negligence or fault of a third party." (Petition pp. 4-5)

In other words, the City raised the "federal question" for the first time upon the Petition for Rehearing to the Florida Supreme Court. The Florida Supreme Court, by its Order denying Petition for Rehearing, filed October 5, 1973, per curiam denied said Petition. (App. 1) This Court

has held that the raising of a federal question for the first time in a petition for rehearing addressed to the highest state court is not sufficient to invoke this Court's jurisdiction if the state court does not entertain the Petition or expressly decide the question. *Radio Station W.O.W. v. Johnson*, 326 U.S. 120, 128; *Hanson v. Denckla* 357 U.S. 235, 243-4; *Herndon v. Georgia*, 295 U.S. 441, 443; *American Surety Co., v. Baldwin*, 287 U.S. 156; *Forbes v. State Council*, 216 U.S. 396; *Simmerman v. Nebraska*, 116 U.S. 54.

It cannot be argued that this is a situation where the federal question was raised upon Petition for Rehearing because the Petitioner was surprised or was given no proper opportunity to anticipate or assert the particular federal question. The Supreme Court of Florida, after initially denying Respondent's Petition for Certiorari before that Court, upon Petition for Rehearing, entered its Order Granting Rehearing And Allowing Certiorari on March 28, 1973. The Court ordered both the City and Respondent to file briefs on the merits pursuant to Rule 4.5c(6), Florida Appellate Rules. (R. App. 1) Briefs were submitted wherein the merits of the cause were strenuously argued. The situation, the facts, the testimony, and the law were all the same at the initial stages of this litigation, through the trial, through the initial appeal to the intermediate state court by the City herein, and all was argued fully in the Briefs on the merits. The City only raised the supposed issue of deprivation of due process of law under the 14th Amendment to the United States Constitution, as admitted, for the first time in its Petition for Rehearing (App. 15-21) filed *after* the Opinion of the Florida Supreme Court to which the Petition for Writ of Certiorari herein is directed. The Florida Supreme Court, in its Opinion,

raised no surprises, or indeed any constitutional issues in its Opinion. It merely reinstated the trial court's finding of false imprisonment because the arresting officer did not have probable cause to arrest. Therefore, the City was not surprised at anything in this Opinion since this had been the trial court's original finding. In addition, the supposed "federal question" was never asserted in the appeal to the intermediate State Court as an examination of the City's Assignments of Error (R. App. 2-3) will reveal. By those Assignments of Error the City sought to review the very same decision upon the very same facts that the Supreme Court of Florida later reinstated. It is the City's burden to demonstrate that the decision of the Florida Supreme Court was a surprise and could not have been reasonably anticipated from prior decisions. *Herndon v. Georgia*, 295 U.S. 441. This it cannot do. It is bound to anticipate the probability of pertinent past decisions being applied by the court sought to be reviewed, as was done in the instant case, and if the result is thereby foreshadowed, it cannot claim surprise.

Since the Opinion of the Florida Supreme Court sought to be reviewed here contains no substantial constitutional questions raised, argued or disposed of by the Florida Supreme Court, and since the asserted "federal question" sought to be relied upon here for jurisdiction was not raised until a Petition for Rehearing which was not entertained or specifically ruled upon by the Florida Supreme Court, this Court has no jurisdiction to determine the constitutionality of any decision since none involving any "federal question" was disposed of by the Florida Supreme Court.

II.

THE DECISION SOUGHT TO BE REVIEWED RESTS UPON ENTIRELY NON FEDERAL GROUNDS.

The Respondent points out in addition that the Florida Supreme Court in its Opinion did not have to, nor did it, arrive at its decision by the disposition of a federal question. Instead, its decision was reached for "non-federal" reasons. The majority Opinion, sought to be reviewed, must explicitly or impliedly recognize the presence of the federal question and render a decision thereon. This Court has long and consistantly adhered to the principle that it will not review a state court judgment based upon an adequate and independent non-federal ground. *Murdock v. Memphis*, 20; Wall. 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Fox Film Corp. v. Muller*, 296 U.S. 207. This is true even though a federal question be involved and perhaps improperly decided by the state court, which is not the situation in the instant case. A reading of the Opinion of the Florida Supreme Court clearly reveals that its decision was based upon two factors;

1. A review of the facts which demonstrated that the arresting officer did not have, himself, probable cause for arrest, and

2. That the intermediate court was incorrect in substituting its appellate judgment for that of the trier of fact.

Based upon this, it can easily be seen that the Florida Supreme Court's Opinion was based upon non-federal grounds, and that these non-federal grounds were adequate to support the judgment. Not only were there adequate grounds upon which to support it, but it was based upon the only grounds involved in the issues before the trial court, the intermediate reviewing court, and the Florida Supreme Court; issues which involved only non-federal questions.

Essentially, while it is recognized that this Court is the arbiter of whether or not the non-federal grounds set forth in the Opinion sought to be reviewed are adequate to support the judgment without consideration of any federal question, (in this case not even raised) there are certain criteria that are employed. These are; the non-federal ground must be broad enough, without considering a federal question, to sustain a judgment, the non-federal grounds must be independent of any federal question, and the non-federal grounds upon which the judgment is based must be tenable. A review of the facts contained within the Opinion of the Florida Supreme Court (App. 3-10) clearly indicate, as set forth *supra*, that the questions presented and decided by the Florida Supreme Court were factual in nature, based upon the testimony, and that these were the only questions involved in the proceedings leading to the Opinion of the Florida Supreme Court.

QUESTION PRESENTED

WHETHER OR NOT THE PETITIONER WAS DENIED ANY CONSTITUTIONAL RIGHT WHICH INVOLVED AN IMPORTANT FEDERAL QUESTION, AND WHETHER OR NOT THIS FEDERAL QUESTION WAS TIMELY PRESENTED TO THE FLORIDA SUPREME COURT SO THAT IT WAS ABLE TO SPECIFICALLY DISPOSE OF SAME.

STATEMENT OF THE CASE

The Respondent is not obliged to accept the Statement of the Case of the proceedings below as set forth in the Petition in that it is misleading and is in factual divergence with the Opinion sought to be reviewed herein. This Statement also impliedly mis-states some of the facts and slants them to a position in accordance with the arguments contained in the Petition. Therefore, the Respondent respectfully submits certain relevant portions of the Opinion of the Florida Supreme Court sought to be reviewed here and adopts same as its Statement of the Case:

> "Two City of Miami police officers during the course of their duties saw Alton Exson (petitioner's decedent) in the right front passenger side of a taxi-cab in a dazed, incoherent condition suffering from a head injury. There was blood on the back of his head, on the seat of the cab and the sidewalk. The police testified that at the scene (taxi) the deceased spoke 'in a slow manner', did not answer coherently and his eyes were 'glassy looking'. 'That's why I started asking his

co-worker what's wrong with him.' The officers did not detect any alcohol on his breath.

Decedent was transported to Jackson Memorial Hospital for an examination. The examining intern at the hospital stated that when he asked about drinking, Exson told him that he had earlier had 'two drinks.' The doctor 'felt that he had been drinking to the extent that he had a staggering gait,' although he conceded that neurological impairment to his legs from a blow on the head could cause his staggering. The doctor had 'no opinion as to whether or not he was drunk'. 'I can't say that he was.' He recalls no conversation relaying his views to the police." (App. 4).

The Supreme Court of Florida also set forth certain of the testimony as to what then transpired, including questions of the trial judge:

'Q. You wrote up an arrest paper, you said?
A. Right, and an injury report.

Q. What was the reason you wrote up both?
A. Well, the reason I wrote up both, because I was not able to determine his problem. I felt like he was injured, I felt like he possibly could have been drunk; I didn't know which one.

Q. You did not know which one at the time—
A. Actually.

* * *

'Q. Would it be a fair statement to say that after you waved goodbye to Mr. Exson leaving in

the ambulance you left it entirely up to whatever doctor examined or was suppose to examine Mr. Exson regarding whether or not he was drunk?
A. Right.

* * *

'Q. Besides that, did he appear to be normal?
A. Drunk or injured.

Q. Drunk or injured?
A. Drunk or injured. His condition could have been from an injury or his condition could have been from some type of alcohol." (Emphasis added)

'THE COURT: He said he [officer] could not determine whether he was drunk or injured, so he said he left it up to the doctor. You tell me [doctor] if, from your examination this man is injured. If he is injured, release him. If he is drunk, you have my arrest slip. Put him in the jail.

THE WITNESS: [Bowles]: Yes.

THE COURT: Am I telling it exactly as it was?

THE WITNESS: Yes, sir, exactly like it was. That's the information that I sent to the hospital.' (App. 4-6).

The court went on:

"After the examination was completed at the hospital Exson was released to the Police Department and taken to jail. It never is clear as

to his arrest. The following day, his condition worsened, and he was returned to the hospital. A few days later, Exson died from multiple fractures of the skull and multiple contusions and lacerations.

Exson's administrator, petitioner herein, sued the City of Miami, respondent herein, and others under the survival statute, for false imprisonment. The complaint alleged that the City by and through its police officers falsely imprisoned Exson and were thereby liable under the doctrine of respondent superior. Following a trial on the issues, the jury said the City falsely imprisoned Exson and awarded $5,000 damages." (App. 6-7).

Respondent accepts the balance of the Statement of the Case found in the Petition.

ARGUMENT

I.

THIS COURT SHOULD NOT RECONSIDER FACTUAL MATTERS DECIDED BELOW.

Although the Respondent will consider the factual questions raised in the City's Petition as they relate to the jurisdiction of this Court, it is appropriate here to first discuss the applicable rulings of this Court as they relate to its abstinence from making decisions which would review state court findings of fact. As will be shortly discussed, the major point that the City seems to be trying

to make in its Petition is that the police officers are not to be lay judges of an arrestee's physical condition as it may relate to whether or not the officer had substantial reason to believe the arrestee was committing a misdemeanor. Therefore, the City goes on, the police officer should not be held responsible for what thereafter transpired after the arrest was made with regard to any damages that may befall the arrestee after he was placed under arrest, even if furthered by the negligence of others. The Supreme Court of Florida had made, in its Opinion, its decision regarding both of these factual matters. In effect, it said, first, that the facts as revealed by the testimony at the trial were such as to clearly and unequivocably establish that the arresting officer in the instant case did not have substantial reason to believe that his arrestee was committing a misdemeanor, in spite of his lack of knowledge as to the arrestee's condition as to physical infirmities. Second, it said that it was not the police officer's dispatching of the arrestee to the hospital that was improper, but it was the factor that he was also under arrest at this time. The Court said, "The subsequent visit to the hospital was merely an interlude over which the deceased had no control in view of his arrest and head injury, and in view of his being promptly dispatched to jail after the hospital examination and placed in a 'drunk tank' there until it was necessary to return him to the hospital where he died a few days later from massive hemorrhaging from multiple fractures of the skull." (App. 8-9) What the court was saying here was clear: That *but for* the *arrest* of the decedent, he would not have been thrown in the drunk tank after visiting the hospital, and his injuries, within the realm of reasonable probability, would not have befallen him and he would not have died.

All of the above matters set forth by the Florida Supreme Court were clearly factual matters. In addition, it held that the intermediate reviewing state court had substituted its judgment on these matters for that of the trier of fact, in reversing, and that this was improper. The City, in its Petition (at page 5), in effect asks this Court to review the standards by which the police officer may be held for his lack of wisdom in making an arrest and, whether the lack of wisdom displayed in this case was the proximate cause of the arrestee's damage, for which the verdict was rendered. This the Court should not do. *Grayson v. Harris*, 267 U.S. 352, 358. This is not a case where any federal right is intermingled with a factual situation, as has been shown. Even if a federal right was involved, as has been set forth, this federal right was never timely raised, so as to make it an issue in the controversy which resulted in the Florida Supreme Court's Opinion. Since this Court has no jurisdiction to resolve factual issues already resolved by the Florida Supreme Court, and since this is what the City seeks this Court to do, jurisdiction will not lie to issue the Writ of Certiorari sought.

It would be necessary for this Court to examine the facts in this case to even consider the City's arguments. This Court has indicated that it does not review evidence and discuss factual situations. *United States v. Johnston*, 268 U.S. 220, 227.

II.

THE DECISION BELOW IS CLEARLY CORRECT.

This portion of this Argument shall deal with the initial thrust of the City's Argument contained in its Petition. At this juncture, it should be pointed out that the City's Petition for Writ of Certiorari fails to include the section on The Reasons for Granting the Writ pursuant to this Court's Rules 23(1)(h) and 19. In spite of this, the City seems to point out that this Court's jurisdiction should be invoked to consider the City's asserted point that it was denied due process of law under the Fourteenth Amendment to the United States Constitution by making it responsible for the negligence or fault of a third party; in this case, the hospital facility and its employees. The City contends that any false imprisonment was committed by the hospital intern "who transferred the Deceased from the hospital to the jail." (Petition, page 5.) The rejoinder to this point is clearly set forth in the Supreme Court of Florida's Opinion where it pointed out:

> "The subsequent visit to the hospital was merely an interlude over which the deceased had no control in view of his arrest and head injury, and in view of his being promptly dispatched to jail after the hospital examination and placed in a 'drunk tank' . . ." (App. 8).

In other words, the force and effect of the initial arrest slip written out by the police officer at the place of arrest continued to govern whether or not the deceased would be dispatched to jail after the examination at the hospital.

If he had not been arrested, he would have not been dispatched to the "drunk tank." Therefore, the contention that the false imprisonment was committed by the hospital intern is without merit since he would have no power to have so committed the deceased to the "drunk tank" where his injuries either originated or were compounded *but for* the arresting officer writing up his arrest slip. (App. 4-5).

In attempting to establish a "federal question," as set forth above, the City next attempts to place the blame upon the intern at the hospital facility by stating that if the intern found the deceased neither drunk nor injured, he should have released the decedent. This point should be discussed with the City's last argument that the police officer merely sent the deceased to the hospital with instructions to send him to jail if he was found to be drunk. In this manner, the City attempts to place the onus upon the intern for making a decision which the police officer was obliged to make himself before he arrested the decedent. An arresting officer cannot delegate away his responsibility to have substantial reason to believe a person is committing a misdemeanor before he arrests him. This was recognized by the Supreme Court of Florida and discussed at length. (App. 4-6, 7-9). The Opinion quoted a recent decision of that panel, *State v. Perez*, 277 So.2d 778 (Fla. 1973), which in turn quoted from this Court's Opinion in *Adams v. Williams*, 407 U.S. 143. The thrust of these two decisions is that, applied to this case, it was grossly improper to have delegated the responsibility to determine "substantial reason" for arrest to a third party. This thus disposes of the City's argument which attempts to place the blame on the intern at the hospital facility for a tort that was set in motion and continued to its ultimate result by the servants of the City.

The City also argues that the Florida Supreme Court set unreasonable and impossible standards of care upon the police officers in making arrests by its ruling in the factual situation outlined in the Opinion. It goes on to assert that the Florida Supreme Court, by its Opinion, requires the police to be judges of possible medical problems and guarantors to life, health and medical safety of arrested persons. This could not be further from the truth. What the Florida Supreme Court clearly set forth in its Opinion was that there must be some basis in fact upon which an arrest might be made before it is made. Knowledge or lack of knowledge of medical problems, latent or no, add or detract nothing from the facts necessary to determine if there is substantial reason to believe someone is committing a misdemeanor. That the police officer was unable to determine if the deceased was injured had nothing to do with his primary responsibility of first determining whether or not he committed a violation of law. As the Florida Supreme Court's Opinion clearly set forth, he did not discharge this duty. The situation is akin to arresting someone, for instance, with a serious heart condition for murder. The heart condition has nothing to do with the culpability of the arrestee. The police, of course, must have reasonable grounds to believe that the arrestee had in fact committed the murder before they could arrest him. If they did not, and the subsequent incarceration proved fatal, and it could be proved that but for the incarceration the victim would not have died, the arresting authority would be liable for false imprisonment. This is the instant case, merely restated.

In response to the cases cited in the City's Petition, which state, in substance, that police officers are not expected to have a complete knowledge of the intricacies of

case law, but are merely expected to act reasonably in making an arrest, the words of the Florida Supreme Court in the instant case, setting forth the factual conclusions necessary, need only to be repeated here:

> "The key time to be considered with respect to an arrest is that moment of arrest at the scene, as to whether there was then and there (not as thereafter may have been concluded) reasonable cause for arrest.[7] The fact was that there was no substantial reason at the scene really to know what was wrong with the unfortunate man at that point. The police officer testified three different times that he did not know at that juncture what was wrong with the man. The only subsequent event that could be related was by the deceased upon inquiry by the doctor at the hospital, that he had two drinks earlier. This alone would not be a 'substantial reason to believe that the person was committing a misdemeanor.'
>
> "Police officers during their duties encounter persons in various conditions of sobriety and health so that they are charged with a degree of judgment of the ordinary police officer in such a situation in determining whether there is substantial reason to believe that the person involved is in the process of committing a misdemeanor,

[7]See State v. Perez, So.2d (Fla. 1973) (Opinion filed May 16, 1973), quoting from Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

namely being drunk, and the officers here have said that they detected no odor of alcohol at the scene. It takes little imagination to understand the jury's conclusion that the officers did not act with substantial reason and to find in favor of the deceased's administrator." (App. 9)

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

A careful examination of the City's Petition strangely leaves one question unanswered. That is, why should this Court exercise its jurisdiction? That the jurisdictional requirements have clearly not been met for the reasons set forth previously herein is clear. But in spite of this, is there any federal question at all that needs to be answered by a review of this case? That the situation is unique is not enough. It is unquestioned that the police officer in this case acted in an unusual manner in allowing someone else who was not a police officer to determine at a distant point in time after the arrest whether or not there was "substantial reason" to have arrested the decedent in the first place. It is this very bizarre set of facts presented in the instant case which belies the City's argument that there is a substantial federal question here. The decision in this case would serve as no guide to others, and would not settle a matter that was occurring frequently in this country. The City has cited this Court to no other instances where similar factual situations have put law enforcement officials in an untenable position. Thankfully, it appears that the situation presented here, occurring over

ten years ago, while not unique, is certainly of an extremely unusual nature. Today, police officers, as they are supposed to, make their own investigation as to probable cause before an arrest takes place. The situation described in the Statement of the Case is not police routine, nor is it common practice. It is limited to the facts in the instant case. Therefore, no ruling of this Court would be of any value as a precedent to others, and this Court for that reason, in addition, should not consider the case since no important federal question is raised here. The question raised was solely one of the City's liability for one "indiscretion" occurring a long time ago.

As was pointed out before, at least impliedly, the City seemed to be missing the point of the entire Opinion of the Florida Supreme Court in this case. It seems to think that the police officer acted in a proper manner in effecting the arrest. This the Supreme Court of Florida rejected. Due process of law means an opportunity to be heard, to present witnesses and cross-examine, and to be judged, in this case, by a jury of one's peers. The City had the benefit of due process of law in this case from the earliest stages of this proceeding, through the intermediate court of appeal, and finally to full review by the Florida Supreme Court. For it to allege that due process of law was violated by the Supreme Court of Florida's decision is to be almost laughable. It had access to three different courts and the full opportunity to argue its position that it was not liable for what happened to the decedent. The jury and the Supreme Court of Florida found to the contrary. Hence, due process of law was not denied to the City; the decision merely went against it. If the City's position here was tenable, in every case where there was vicarious liability or where the issue was one of liability for all dam-

age, even when not directly caused by the tortfeasor, the aggrieved party would be claiming deprivation of due process of law under the Fourteenth Amendment to the United States Constitution. This is not what due process is. There could not have been more "due process' than in the instant case which resulted in the ultimately correct decision after a decision on the merits which was exhaustively reviewed thereafter.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

THEODORE M. TRUSHIN
420 Lincoln Road Mall, Suite 600
Miami Beach, Florida 33139

BY: Theodore M. Trushin
Counsel for Respondent

November 28, 1973.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1973
WEDNESDAY, MARCH 28, 1973

CASE NO. 42,937

DAVID SPICY,

Petitioner,

vs.

CITY OF MIAMI, a municipal corporation,

Respondent.

ORDER GRANTING REHEARING AND ALLOWING CERTIORARI

The petition for rehearing is granted and the Clerk is directed to issue the Writ and set the cause down for oral argument.

The Petition herein for a Writ of Certiorari to the District Court of Appeal, Third District of Florida, is granted and the cause is hereby set down for oral argument at 9:30 o'clock a.m. Tuesday, May 15, 1973. A maximum of fifteen (15) minutes to the side is allowed but counsel is expected to use only so much of that time as is necessary.

The Court has tentatively accepted jurisdiction of this case; however, the parties should be prepared to argue the jurisdictional issue should the question be raised by the Court.

The time for filing briefs on the merits is set forth in Rule 4.5c(6), F.A.R.

ROBERTS, ERVIN, McCAIN and DEKLE, JJ., concur

CARLTON, C.J., ADKINS and BOYD, JJ., dissent

A True Copy

TEST:

/s/ Sid J. White

Sid J. White
Clerk Supreme Court.

By: Sara Gainey, D.C.

cc: Honorable William P. Carter
Theodore M. Trushin Law Offices
Honorable R. Harris Turner

ASSIGNMENTS OF ERROR

1. The verdict on liability is contrary to the law.

2. The verdict on liability is contrary to the evidence.

3. The verdict on liability is contrary to the law and the evidence.

4. The verdict on liability is contrary to the manifest weight of the evidence.

5. The verdict on damages is contrary to the law.

(a) The award of $5,000.00 is excessive. The issue should have been limited to damages suffered by deceased as a result of his stay in jail. Deceased remained in jail overnight. There is no evidence that he suffered any pain as a result. There is no evidence of loss of reputation. There is no evidence of humiliation. Thus, the award is based upon pure speculation or upon an improper consideration by the jury of the death of the deceased.

6. The verdict on damages is contrary to the evidence.

7. The verdict on damages is contrary to the law and the evidence.

8. The verdict on damages is contrary to the manifest weight of the evidence.

9. The court erred in refusing to grant the motion for mistrial made by counsel for defendant immediately following a remark by counsel for the plaintiff to the effect that the defendants, Jackson Memorial Hospital and Dr. Preston Whaley were no longer in the case.

Section 768.041(3), Florida Statutes, on the subject of a release or covenant not to sue, states as follows:

> "The fact of such a release or covenant not to sue or that any defendant has been dismissed by order of the court, shall not be made known to the jury." See Hertz Corporation v. Hellens, Fla. App. 1962, 140 So.2d 73, City of Coral Gables v. Jordan, Fla.App. 1966, 186 So.2d 60, 62, 191 So.2d 38.

10. The court erred in determining that Dr. Preston Whaley was an adverse witness.

11. The court erred in determining that officer M. C. Bowles was an adverse witness.

12. The court erred in failing to grant the motion for directed verdict made on behalf of the defendant at the close of the plaintiff's case on liability.

13. The court erred in failing to grant defendant's motion for directed verdict made at the cloclusion of all the evidence on liability.

14. The court erred in admitting into evidence the head slip issued by Dr. Whaley.

15. The court erred in allowing the witness, Anderson Johnson, to testify inasmuch as the name of this witness was not included in the list of witnesses furnished to defendant by plaintiff pursuant to the order of the court.

16. The court erred in allowing the medical records custodian for Jackson Memorial Hospital to testify inasmuch as the name of this witness was not included in the list of witnesses furnished to defendant by plaintiff pursuant to the order of the court.

17. The court erred in admitting into evidence the records of Jackson Memorial Hospital.

18. The court erred in admitting into evidence the autopsy report of Dr. Loynaz.

19. The court erred in allowing into evidence the mortality tables.

20. The court erred in failing to grant defendant's motion for directed verdict on damages made at the conclusion of plaintiff's case on damages.

21. The court erred in refusing to admit into evidence a document certified by the Clerk of the Municipal Court of the defendant containing the arrest record of the deceased.

22. The court erred in refusing to limit the issue of damages to any damage suffered by the deceased during the time he spent in jail.

23. The court erred in instructing the jury regarding aggravation of an alleged existing physical condition of the decedent.

24. The court erred in instructing the jury that the death of the deceased could be considered as an element of damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief for Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida was mailed to John S. Lloyd, City Attorney, and Montague Rosenberg, Assistant City Attorney, at 65 S.W. First Street, Miami, Florida 33130, this 6th day of December, 1973.

THEODORE M. TRUSHIN
420 Lincoln Road Mall, Suite 600
Miami Beach, Florida 33139

BY Theodore M. Trushin
THEODORE M. TRUSHIN